

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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INGERSOLL-RAND COMPANY,

Plaintiff,

v.

CENTURY INDEMNITY COMPANY (as  
successor to CCI Insurance Company,  
successor to Insurance Company of North  
America),

Defendant.

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Case No. 06-CV-6476 (LTS)(THK)

**AFFIDAVIT OF JOHN CLARY IN  
OPPOSITION TO DEFENDANT'S  
DISMISSAL MOTION**

STATE OF NEW JERSEY    )  
                                  ) ss.:  
COUNTY OF BERGEN     )

JOHN CLARY, being duly sworn, deposes and says:

1. I submit this Affidavit in opposition to the dismissal motion filed by Century Indemnity Company ("Century").

2. I am Director, Product Liability at Ingersoll-Rand Company ("Ingersoll Rand"). During the time period set forth below, I also was Ingersoll Rand's Risk Manager.

3. Century and Ingersoll Rand, from 2002 through 2003, intermittently discussed settling their dispute arising from the Century excess liability policies at issue in this. I participated in some of those discussions, including: (1) a 2002 New York dinner meeting with Ingrid Morscher (Ingersoll Rand's consultant), Bill Hart (Ingersoll Rand's counsel), Malcolm Myers (Century's representative) and Cliff Hendler (Century's counsel); (2) the Hamburg, New Jersey meeting referenced in Mr. Myers' June 7, 2007 affidavit; (3) an October 2004 New York dinner meeting with Gerald Swimmer (Ingersoll Rand's Vice President of Tax and Legislative

Affairs) and Mr. Myers; and (4) a July 17, 2006 New York dinner meeting with John Fromholtz (Ingersoll Rand's Director of Risk Management), Daniel Weiker and Mr. Myers. The above demonstrates the parties discussed settlement at sites outside New Jersey and, particularly, in New York. *See also* Exhibit A.

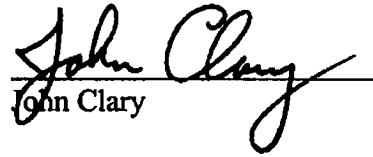
4. In July 2003, Mr. Myers also proposed to meet with Ms. Morscher in New York City. *See* Exhibit B ("We can meet in New York or anywhere else convenient.... Since I am already in NYC on August 7<sup>th</sup> and 8<sup>th</sup>, my first choice would be August 5<sup>th</sup> or 6<sup>th</sup>....").

5. The Hamburg, New Jersey meeting was arranged by Mr. Myers, Ms. Morscher and myself as a follow-up to Mr. Myers and Ms. Morscher's previous meeting in New Hope, Pennsylvania, and in response to Mr. Myers request to meet to try to "reach a proposal for resolution that we can both recommend to our respective management." *See* Exhibit B. We ultimately decided to meet for breakfast in Hamburg, New Jersey because Mr. Myers and I decided to play golf at the Ballyowen Golf Club.

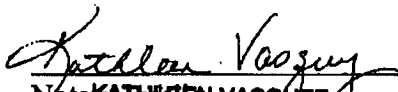
6. I believe Mr. Myers knew that based on my and Ms. Morscher's positions at Ingersoll Rand we lacked authority to discuss settlement terms, finalize a settlement agreement with Century or bind Ingersoll Rand to any settlement terms (hence Mr. Myers' reference to recommending a settlement "to our respective management"). *See* Exh. B. At breakfast, Mr. Myers advised he could settle the dispute over the Century Policies' liability limits by paying between \$35 million and \$40 million. We reached no agreement on a settlement amount, much less on \$37.5 million which is less than the authority Mr. Myers stated he had at that time. We, instead, advised Mr. Myers that we would discuss his offer with Ingersoll Rand's management. Mr. Myers and I thereafter commenced our golf game.

7. Following the Hamburg meeting, I asked Ms. Morscher to ask Mr. Myers to put a settlement proposal in writing so we had something to discuss with Ingersoll Rand's management.

7. In late December 2003, following receipt of Mr. Myers' draft proposed settlement agreement, I instructed Ms. Morscher to tell Mr. Myers that Ingersoll Rand could not agree to Century's settlement proposal.

  
John Clary

Sworn to before me this  
5 day of July, 2007

  
KATHLEEN VASQUEZ  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Oct. 15, 2007

# **EXHIBIT A**

Subj:Ingersoll-Rand - INA - Asbestos  
Date:1/4/03 1:04:36 PM Eastern Standard Time  
From:Hartlaw  
To:chandler@crowell.com  
CC:imorscher@nac.net, John\_Clary@irco.com

Cliff:

Our meeting at my office on October 17, 2002 seemed productive, but we have made no progress since then toward concluding an agreement between Ingersoll-Rand and INA.

Ingrid and I would be happy to travel to Philadelphia to meet with Malcolm and you if that would enable us to resolve any outstanding issues and conclude an agreement.

Please let me know if you and Malcolm believe that a meeting would be productive, and if not, please let me know how you and Malcolm would like to proceed.

Bill

Subj:Ingersoll-Rand - INA - Asbestos  
Date:2/12/03 11:21:59 AM Eastern Standard Time  
From:Hartlaw  
To:chandler@crowell.com  
CC:John\_Clary@irco.com, imorscher@nac.net

Cliff:

This will confirm that we (Malcolm, John Clary, Ingrid, you and I) will meet after the Strategies 2003 meeting on March 25, 2003, at the offices of Debevoise & Plimpton, to discuss the coverage issues regarding INA's excess policy. Ingrid and I estimate that the Strategies 2003 meeting will end at about 3 pm, so that we should have ample time. If we need additional time, we can continue our discussions over dinner.

Also, as I mentioned to you, Ingrid and Malcolm have discussed the possibility of dinner the night before, Monday, March 24, 2003. If that happens, John Clary and I expect to attend. If Malcolm would like you to attend also, we can start our discussions Monday evening.

Just so it is clear, Malcolm can pick the place or places for dinner, and Ingersoll-Rand will pick up the tab.

Bill

Subj:RE: Ingersoll-Rand - INA - Dinner on Monday  
Date:3/19/03 5:53:24 PM Eastern Standard Time  
From:CHendler@crowell.com  
To:Hartlaw@aol.com  
CC:imorscher@nac.net, John\_Clary@irco.com,  
malcolm.myers@ace-ina.com

Bill: Malcolm and I look forward to joining you, Ingrid and John. Thanks again for your hospitality. I've confirmed with Malcolm that the 7:00 p.m. time works for both of us. Cliff H.

-----Original Message-----

From: Hartlaw@aol.com [mailto:Hartlaw@aol.com]  
Sent: Monday, March 17, 2003 3:21 PM  
To: Hendler, Cliff  
Cc: imorscher@nac.net; John\_Clary@irco.com  
Subject: Ingersoll-Rand - INA - Dinner on Monday

Cliff:

Next Monday, I-R will be taking you and Malcolm to Sparks Steak House at 210 E 46th St. (Between 2nd & 3rd Aves.). Sparks is one of the best (I think the best) steak houses in the City. If I make the reservation for 7 pm, will that work for Malcolm and you?

Bill

# **EXHIBIT B**



----- Original Message,-----

From: Myers, Malcolm L TL15A

To: 'Ingrid Morscher (IMorscher@nac.net)'

Sent: Tuesday, July 08, 2003 10:08 AM

Subject: Ingersoll-Rand Coverage

Ingrid,

Can we schedule a time to get together to talk about resolving the coverage issues between I-R and ACE? Perhaps just you and I, without outside coverage attorneys, can reach a proposal for resolution that we can each recommend to our respective managements. Although I think very highly of both Cliff Hendler and Bill Hart, it may be easier for just the two of us to discuss these matters.

We can meet in NY or anywhere else convenient. My calendar was beginning to fill and I thought I should try to resolve issues with I-R before too much time passed. Since I am already in NYC on August 7th and 8th, my first choice would be August 5th or 6th, if I can change a meeting scheduled in Chicago on the 6th or send someone else. Four days in NY could be fun. I will get back to you on that. The 2nd or 3rd week in August are also good.

In any event, give it some thought and give me your comments.

Hope everything is going well for you.

Malcolm L. Myers, Vice President, Complex Issues Management, ACE  
USA, TL15A, Phone: (215) 640-2172, Fax: (215) 640-5560, E-mail:  
malcolm.myers@ace-ina.com